IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 51

UNITED STATES OF AMERICA, *Appellant*,

v.

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE COMPANY, LEVER BROTHERS COMPANY, and THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC., *Appellees*.

On Appeal from the United States District Court for the District of New Jersey

MOTION OF APPELLEE LEVER BROTHERS COMPANY TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Revised Rules of this Court, appellee, Lever Brothers Company (hereinafter "Lever"), respectfully moves this Court to dismiss this appeal or to affirm the judgment below on the ground that the order is not appealable.

The reasons supporting this motion are as follows: (1) This is an appeal from an order obtained by appellant merely as a device to secure review of a non-appealable interlocutory order of discovery entered under Rule 34 of the Federal Rules of Civil Procedure. It is not a "final order". (2) The order of dismissal was entered on motion of appellant. Appellant invited, procured and consented to the order. Accordingly, appellant is not aggrieved and is estopped to appeal from the order.

The Jurisdictional Statement filed by the appellant does not faithfully set forth the facts relevant to the jurisdictional issue, or correctly state the jurisdictional issue, as we shall discuss hereinafter.

STATEMENT

1. The Appeal

This is an appeal by the United States (plaintiff below) from judgments of the United States District Court for the District of New Jersey, entered on September 13, 1956, dismissing the present action. The appeal purports to be taken pursuant to Section 2 of the Expediting Act of February 11, 1903 (32 Stat. 823, 15 U.S.C. § 29, as amended, 62 Stat. 869, 989).

The judgments of dismissal were made pursuant to an order of the District Court entered upon the motion of the appellant itself. (Appellant's Jurisdictional Statement, p. 5 fn. 3). Appellees did not consent to the dismissal, but merely stated that they could not oppose a motion by the United States which would have the effect of dismissing the complaint against them (Appellees' Joint Appendix, 37).

2. The Background

This action was brought by the United States under Sections 1 and 2 of the Sherman Act against Lever and two other companies engaged in the soap and detergent business, and against the trade association for the industry. The complaint was filed on December 11, 1952, about three weeks after the discharge of a grand jury, convened in the District of New Jersey, which had investigated the industry. The grand jury began its proceedings in May, 1951, and was discharged on November 25, 1952. It did not return an indictment. The grand jury was obviously employed by the Department of Justice as an instrument of discovery for civil proceedings, in lieu of the use of the procedures provided by the Federal Rules.[1] The complaint herein was based upon the evidence, both documentary and testimonial, which had been obtained in the grand jury proceedings (Department of Justice Press Release, quoted in Opinion, Jur. St. 15).

The case was still in the pre-trial stage at the time that the court below entered the order which the appellant seeks to have this Court review, namely, directing the appellant to make available to defendants the transcripts of testimony of witnesses before the grand jury. The Department of Justice had extensively used the documents and testimonial evidence obtained by it before the grand jury (see Jur. St. 16-17, 53). Most of the documents which had been before the grand jury, including most of the documents which had been obtained by grand jury subpoenas from persons that were not made defendants in this case, had been made available to the

[1] See Opinion, Jur. St. 14-16.

defendants for inspection and copying (Record, Stipulation for Inspection and Copying by Defendants of Certain Third Person Documents, July 15, 1953).

The documents obtained by the grand jury and the transcript of testimony before the grand jury had been removed to Washington for study by the plaintiff's agents and employees without restriction to those authorized to act in conjunction with the grand jury (Appendix to Opinion, Jur. St. 29-30).

Pursuant to Rule 34, the Department of Justice had also obtained supplemental documents from the defendants, largely to bring up to date the evidence which it had obtained from the grand jury (Opinion, Jur. St. 15). The case rapidly assumed the gargantuan proportions of the usual "Big Case". Judge Modarelli devised procedures for administering the case and assuring full interchange of information prior to trial. These procedures were approved and commended by counsel for the plaintiff and the defendants (Appendix to Opinion, Jur. St. 25).

The discovery order involved in the present appeal was one of the administrative orders of the court, entered pursuant to its discretionary powers under Rule 34 in order that the defendants might have access to relevant information equal to that of the plaintiff and that the duplication and delay which would be involved if the defendants took the oral depositions of the witnesses before the grand jury might be avoided (Opinion, Jur. St. 17; Appendix to Opinion, Jur. St. 24).

3. The Relevant Proceedings and Orders

Each of the appellees filed a motion under Rule 34 for an order granting leave to inspect and copy the

transcripts of testimony—not the entire minutes—of the grand jury proceedings (J.A. 1, 5, 6, 8). The basis of these motions was that the plaintiff-appellant through agents not connected with the grand jury had long had access to and had used those transcripts for purposes of the civil proceeding; that the plaintiff intended to use the testimony in such transcripts at the trial; that there was no reasonable basis for distinguishing between the documentary evidence which had been before the grand jury and the testimony of witnesses before it; that knowledge of the testimonial evidence which was being used by the plaintiff was essential to the defendants in the preparation of their case; that, in Lever's case, not one of the officials of the company who appeared before the grand jury was any longer connected with the company; that the trial of the case would be greatly delayed and the expense thereof greatly increased if defendants were compelled to take the depositions of more than twenty-five witnesses who had testified before the grand jury; and that in any event, the recollection of such witnesses, years after the events and several years after they testified, was not an adequate substitute for their testimony as recorded before the grand jury; and that no reason in law or in fact appeared for denying to defendants access to such testimony.

On April 17, 1956, after elaborate consideration, the court granted these motions in the interests of fairness and of full, mutual discovery and as part of sensible administration of the "Big Case" in order to avoid delay and duplication. The court's order was based on the court's finding that the "plaintiff is using the transcripts"; that "equal use of the transcripts by defendants will give them the fullest possible knowl-

edge of the facts before trial"; and that "none of the reasons for the rule of secrecy applies". (Opinion, Jur. St. 49-50). Accordingly, the court concluded that "the ends of justice" required him to make the transcripts available to the defendants.

On April 30, 1956, the plaintiff-appellant filed a motion for reconsideration, which was argued on June 11, 1956. This was denied in a second opinion of the court, filed on July 9, 1956. Proposed orders were submitted by each of the defendant-appellees and a hearing was held thereon on July 23, 1956.

At this hearing, the appellant's counsel informed the court that the Department of Justice would in no event produce the transcripts called for by the proposed orders. Mr. McDowell, a Department of Justice attorney, stated:

> "MR. MCDOWELL: I am instructed, your Honor, by the Attorney General to inform the Court that the Government must respectfully decline to produce the transcripts called for by the orders which have been tendered." (J.A. 13).

The court, despite this announcement, entered its order requiring the plaintiff to produce the transcripts of testimony within thirty days. The plaintiff consented to the form of these orders (J.A. 16-22).

The Department, however, did not await the expiration of the thirty day period. It made no effort to ascertain what remedy or penalty would be imposed by the court in the event of non-compliance. It was aware that a motivating factor in the court's decision was "The fact that the plaintiff has used and will continue to use the transcripts" (Opinion, Jur. St. 17). Presumably, it was also aware that the court could have

confined its remedy for non-compliance to an order that the transcripts should not be further used by the plaintiff, and that the court had a wide range of penalties and remedies under Rule 37.

But the Department of Justice did not wish to await this normal development in the trial court, nor did it wish to apply to an appellate court for a writ of mandamus or prohibition. It decided to take matters into its own hands, and to seek immediate review of the production order. Accordingly, on August 16, 1956, prior to the time for compliance with the order of July 23, appellant filed a motion to amend that order.[2] It tendered a form of amended order which provided that

> "unless the plaintiff on or before August 24, 1956 [the date for compliance with the order of July 23] produces . . . the aforesaid transcripts . . . the Court will enter an order dismissing the complaint herein." (J.A. 25-26).

The appellant made it entirely clear that its sole purpose in proposing dismissal of the complaint was to enable it to appeal the production order. Appellant reiterated its previously announced statement that it did not intend to comply with the trial court's order, but it sought—as litigants have often tried to do, with practically universal lack of success—to appeal from the order without either obeying or disobeying it. In its effort to achieve the desired result, the appellant filed an affidavit of the Attorney General himself. The Attorney General's affidavit said:

> ". . . It is my intention to seek review of that ruling in the Supreme Court of the United States."

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[2] Plaintiff's motion asked in the alternative that, in the event the order was not amended as requested, a stay be granted pending review. This alternative was not pressed. (J. A. 24).

> ". . . In my considered judgment, it would be unseemly for the chief law enforcement officer of the United States to be placed in the dilemma either of having to comply with a court order which he considers erroneous and compliance with which he deems contrary to the public interest, or, alternatively, with being required to disobey the order, without first having an opportunity for effective appellate review of the order." (J.A. 27).

This purpose—to obtain appellate review of the discovery order without either obeying or disobeying it—was reiterated by trial counsel for the Department at the hearing on appellant's motion on August 21. Mr. McDowell stated:

> "Your Honor, our motion this morning seeks to put in proper posture for review on appeal your Honor's ruling with respect to the production of grand jury transcript for civil discovery purposes." (J.A. 34).

Defendants then told the Court that they did not see how they could object if the Government moved for a dismissal of the case against them, although they believed that the order of July 23 was a "sufficient order at this stage of the proceedings"; i.e., prior to compliance or non-compliance by the plaintiff (J.A. 37).

Accordingly, the motion of the plaintiff-appellant was granted. An "Amended Order" was entered on August 21, 1956, in precisely the form requested by the plaintiff, providing that unless the plaintiff produced the transcripts on or before August 24, 1956, the court would dismiss the complaint (J.A. 25-26).

Pursuant to its program of procuring an order of dismissal so that it might obtain appellate review of the discovery order, the plaintiff did not produce the transcripts, and so notified the court by letter. Thereupon, the court on September 13, 1956, entered its orders dismissing the action. This appeal is taken from these orders of dismissal.

THE ISSUE AND ITS IMPLICATIONS

1. The Issue

The jurisdictional issue presented by this appeal is whether a plaintiff may appeal from an order dismissing a complaint, procured by the plaintiff for the purpose of obtaining appellate review of a non-appealable, interlocutory discovery order, where the effect of the dismissal order is merely to "to put [the interlocutory order] in proper posture for review on appeal" (J.A. 34).

It will be noted that the orders of dismissal were *not* imposed by the court as a penalty for non-compliance. The order of July 23 did not provide any penalty for non-compliance. In the event of non-compliance, the court would have had a choice of various remedies or penalties. It might have forbidden the plaintiff to use any of the grand jury transcripts for impeachment of witnesses, or otherwise. It might have cited counsel for contempt, in which event an appeal would lie. The fact, however, is that the court had no opportunity to exercise this choice. The plaintiff-appellant sought and obtained the orders of dismissal, pursuant to a procedure which it carefully devised for the purpose of avoiding either compliance or a moment of default in which the discretion of the

court, rather than the design of the plaintiff, could have been exercised.

The orders were not sought by the defendant-appellees. In the event of non-compliance with the orders to produce, the defendant-appellees might have moved for the entry of various types of orders by way of remedy of penalty. They might, among other things, have merely sought to preclude further use of the transcripts, or they might have sought an order of involuntary dismissal which, if granted, would have had the effect of an adjudication on the merits under Rule 41(b). They did not. They had no occasion to make any such motion.

The orders of dismissal were entirely the result of the choice and initiative of the plaintiff. The plaintiff now seeks to appeal from them. Such an appeal does not lie, as we shall show.

2. The Appellant's Misstatement of the Issue

The plaintiff-appellant is obviously fearful that the fact that it sought and obtained the orders of dismissal presents an insurmountable obstacle to its appeal. It attempts to meet this problem by an inaccurate statement of the issue.

In the "Question Presented", the plaintiff states that "the district court directed the United States, *over its objection and on pain of dismissal of the suit,* to permit the defendants to inspect and copy the transcript of the testimony of all witnesses who had appeared before the grand jury". (Jur. St. 3) (Emphasis supplied).

This statement is inaccurate and misleading. At no time was dismissal of the suit threatened, suggested or

discussed until plaintiff itself filed a motion asking for this relief in order to put the discovery order "in proper posture for review on appeal" (J.A. 24-26, 34).

(a) The initial order for inspection, dated July 23, which was entered over plaintiff's objection, did *not* specify any penalty. It was *not* entered "on pain of dismissal of the suit".

(b) The *amended* order of August 21 was made on plaintiff's motion. The provision for dismissal of the complaint was *not* entered over the objection of the United States. The United States *sought and obtained* such a provision in the order for the purpose of enabling it to file this appeal in circumvention of the usual requirement that a party must obtain an order finally disposing of the issues, or a contempt adjudication, before obtaining appellate review of a discovery order.

In a footnote on page 5 of its Jurisdictional Statement, plaintiff recognizes that these, and not the statement in its "Question Presented", are the facts: that the dismissal was at the plaintiff-appellant's solicitation; that the original order did not state the consequences of non-compliance; that the order was amended upon the Government's motion; and that the Government now is attempting to appeal from a dismissal which is of its own seeking. (Jur. St. 5, fn. 3).

3. Implications of the Jurisdictional Issue

Simply stated, the Department of Justice is here seeking appellate review of an interlocutory order which it has neither obeyed nor disobeyed. In effect, it seeks an advisory opinion, in advance of final judicial action, as to the right of a trial court involved in the

vast detail of an anti-trust case to order that the defendants be allowed to examine the transcripts of the testimony of witnesses before a grand jury.

We do not challenge the bona-fides of the Department's concern about this issue. But the issue, like all others in our judicial system, must be considered at a time and in a context that make it appropriate and feasible for appellate review. It should not be adjudicated *in vacuo*, by passing the judgment that the trial court might exercise in the event of non-compliance and detouring the stream of litigation which washes away so many interlocutory orders which, when entered, appear to the parties to be of surpassing importance.

At no time did the Attorney General's representatives seek to ascertain what remedy or penalty the trial court would adopt to implement its order, to achieve the result which the order was intended to serve, or to penalize non-compliance. At no time did they seek to narrow or condition the trial court's order, or to offer to refrain from using the grand jury transcripts (*Cf.* Jur. St. 13-16). They merely took the position that the order was erroneous, and that it would be "unseemly" for them to comply or to disobey. It was on this extraordinary basis that they devised the present extraordinary procedure by which they hope to obtain appellate review of an admittedly non-appealable order at this preliminary stage of the present anti-trust case.

Various alternatives were available to the Department which would not have involved the difficulties of this appeal or the invitation to this Court to create a precedent which, as we shall discuss, will invite imitation and disrupt established, orderly litigation procedures.

(a) The Department might have complied with the court's direction, and have awaited final judgment in the case to obtain review of the order relating to the grand jury transcripts. *United States* v. *Reynolds,* 345 U.S. 1. No harm would have been done. The grand jury testimony here is about soap and synthetic detergents. It does not involve secret information vital to the security of the nation.

(b) The Department might have disobeyed. Even if the consequences had been a contempt order, there would be nothing "unseemly" about this which is not implicit in the act of non-compliance itself. If there is anything "unseemly"—which we do not believe—it is the Government's decision that it would not comply with the court's order. But that decision was announced in open court on July 23, and the Government's "unseemly" refusal, if such it was, persists to this day. Certainly, contempt orders against the Government and appeals therefrom are not unprecedented. See *Bowman Dairy Co.* v. *United States,* 341 U.S. 214 and *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462.

(c) Alternatively, the Department might have filed an application with this Court under 28 U.S.C. § 1651, for a writ of mandamus or prohibition immediately after entry of the initial order of July 23. If the Department believed that the issue was of such great importance to the public interest, this was obviously the course to pursue. There can be little doubt that it would have obtained a stay from either the trial judge or this Court. This procedure would have enabled this Court to exercise its judgment as to whether the effect of the interlocutory order was so serious as to warrant immediate review.

This Court has given repeated assurances that it is ready to employ extraordinary writs when the need is clear and impelling. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379; *Note*, 50 *Columbia L. Rev.* 1102 (1950). This Court has the power and the duty to make this sort of judgment. But what has happened in the present case is that the Department of Justice has sought to circumvent or to arrogate to itself this power. It has itself decided that the interlocutory issue is of such importance as to require immediate review, and it has proceeded to devise a procedure which it hopes will compel review of the issue at this preliminary stage of the litigation. If it is successful, a device of great promise to litigants is available to obtain review of interlocutory orders.

The Government as a party to litigation is like any other litigant. It is not entitled to special rights. *Bank Line* v. *United States*, 163 F. 2d 133, 137-138 (2d Cir. 1947). The device invented by the Government in this case will, if successful, also be available to private litigants with the result that any plaintiff who objects to an interlocutory order will be able to take a nonsuit or obtain a voluntary dismissal under Rule 41(a), and by appealing from the dismissal order, will be able to obtain review of the interlocutory order. This, we submit, is not permissible under the rules governing the jurisdiction of federal appellate courts. Review of interlocutory orders may be had only after final judgment, upon an order for contempt, or, if the issue is sufficiently grave and urgent, by extraordinary writ under 28 U.S.C. § 1651.

In the present case, the Government apparently has resorted to this device because it feels that these traditional appellate principles should not apply to the Gov-

ernment where the Department of Justice considers that the interlocutory order is important. As the Attorney General stated, he felt that "it would be unseemly" for the Government to comply with such an order or to disobey it, before seeking review (J.A. 27). This is the *only* reason advanced for the order providing for dismissal.

Assuming, however, that compliance or disobedience were the plaintiff's only alternatives, they are precisely the same that confront all litigants in respect of interlocutory orders under the rules of the federal appellate courts. It is similarly "unseemly" for them to disobey a court order; it is equally painful to have to comply with an order deemed erroneous; and it is similarly unsatisfactory to await the final decision of the trial court before vindicating a procedural right or immunity. Nevertheless, these hardships must be endured. See *Parr* v. *United States*, 351 U.S. 513.

Indeed, if the hardship is sufficiently great, it may be presented to this Court, as we have noted, by means of a petition for prerogative writ of mandamus or prohibition. This Court could then decide in orderly fashion whether the situation justified extraordinary relief. The Attorney General may not unilaterally obtain extraordinary review of a non-appealable order by the transparent device of a voluntary dismissal. In effect, this device would remove from this Court the power, in extraordinary situations, to decide whether it will review interlocutory orders by means of the extraordinary writs, and would vest that power in the hands of a resourceful litigant who obtains a nonsuit or dismissal order.

In the present case, the Attorney General took little risk in moving for dismissal in order to appeal the interlocutory order. In effect, he obtains a free ride to this Court. If the dismissal order is affirmed or if the plaintiff's appeal is dismissed, the Government may institute a new action, if it believes that it has the facts, based upon a new, up-dated complaint. The complaint herein was filed on December 11, 1952. Profound changes have taken place in the industry and in the position of the defendants, due particularly to the effect of the displacement of soaps by chemical detergents, and a new or amended complaint would in any event probably be necessary prior to trial.

In any event, we respectfully submit (1) that the Attorney General should have awaited the decision of the lower court as to what, if any, penalty or remedy it chose to impose or adopt as a result of the plaintiff-appellant's decision not to comply with the court's order; and (2) that having chosen to seek dismissal of the case rather than await the outcome, the plaintiff-appellant may not appeal.

ARGUMENT

This appeal is an attempt by the United States to obtain immediate appellate review of an interlocutory order of the district court requiring the production of certain documents prior to trial. Such an order may not, of course, be appealed. Appellate review may be had only after adjudication of the merits of the controversy, or, prior to final determination of the controversy, only by disobeying the order to produce and incurring the penalty of contempt. *Alexander* v. *United States*, 201 U.S. 117; *Cogen* v. *United States*, 278 U.S. 221; *Apex Hosiery Co.* v. *Leader*, 102 F. 2d

702 (3rd Cir. 1939); *R. D. Goldberg Theatre Corp.* v. *Tri-States Theatre Corp.*, 119 F. Supp. 521 (D.C.D. Neb. 1944).

In the present case the United States, instead of following the accepted procedures for review, is seeking to initiate a new and unique procedure for the avowed purpose of obtaining appellate review of the production order apart from and in advance of a determination of the merits.

This appeal, if allowed, will result in piecemeal review of the issues between the Government and the defendants. This Court would be undertaking to consider this litigation in fragments in direct conflict with long-established Congressional policy limiting appellate review to *final* judgments.

It is appellees' position that this appeal may not be maintained because (1) the dismissal order entered below has no greater appealability than the discovery order which underlies it; and (2) plaintiff is barred from appealing because it invited, procured and obtained the order which it now seeks to review.

1. The District Court's Order of Dismissal Is Not Appealable Because It Is Not a Final Determination of the Controversy

An order may be appealed to this Court from a district court only if it is "final". 15 U.S.C., § 29; 32 Stat. 823. Whether an order is final depends upon whether or not it represents a conclusion of the entire controversy. *Cobbledick* v. *United States*, 309 U.S. 323, 325-26. Piecemeal review of isolated issues in a controversy has been forbidden by Congress. *Ibid.*

Finality, as this Court has defined it, is a practical concept, not a matter of mere form. It "is not a tech-

nical concept of temporal or physical termination". *Cobbledick* v. *United States, supra,* at p. 326.[3]

A dismissal which leaves the merits of a controversy undetermined and arises only from a collateral or subsidiary issue is not a final order. The plaintiff may resume the controversy simply by filing a new complaint. This is illustrated by *Kelly* v. *Great Atlantic & Pacific Tea Co.,* 86 F. 2d 296 (4th Cir. 1936). That action was begun in a state court and removed by defendant into a federal court. Plaintiff moved to remand and when this motion was overruled, submitted to a dismissal. Plaintiff then sought to appeal from the dismissal, assigning as error only the order refusing remand. The Court of Appeals for the Fourth Circuit held that the judgment of dismissal was not final because the underlying order refusing to remand was not final or appealable, "and plaintiff cannot make it in effect appealable by the simple expedient of taking a voluntary nonsuit and appealing." 86 F. 2d at 297. Compare *V. O. Machinoimport* v. *Clark Equipment Co.,* 12 F.R.D. 191 (D.C. S.D.N.Y. 1951).

Similarly, in *Parr* v. *United States,* 351 U.S. 513, 518, this Court held that a dismissal order in a criminal case was not final and hence not appealable where the only issue determined involved venue.

In contrast to the above cases are situations where the plaintiff is, in practical effect, prevented from proceeding with the controversy so that the order actually terminates the litigation between the parties on the

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[3] Whether a motion and order "is to be treated as independent and plenary or as merely a procedural step in a pending trial must be determined by particular circumstances." *United States* v. *Wallace & Tiernan Co.,* 336 U.S. 793, 802.

merits of the case. Such an order is final. *St. Louis, I. M. & S. Ry. Co.* v. *Southern Express Co.*, 108 U.S. 24, 28. This was the case in *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793. In that case certain orders of the district court prevented the United States from using for purposes of trial certain documents on which it relied. This made it impossible for plaintiff, the United States, to prove its case. The case was thereupon dismissed for failure of proof but without prejudice to bring it another time. The dismissal was not at the invitation of the plaintiff. 336 U.S. at 794. Since the United States was, in actuality, precluded by the pre-trial orders from bringing its case again, it was able to obtain review of the dismissal.

The order of dismissal entered below is clearly not a final determination of this controversy on the merits, nor does it bring to this Court for review any order of the court below which either legally or practically determines the decision of the merits of the controversy. The Government raises only one issue here: the propriety of a direction, prior to trial, requiring the plaintiff to make available certain documents to the defendants. This does not affect the merits of the action, nor does it present an obstacle to trial of the case sufficient to warrant immediate review.

This Court has frequently held that it will not permit a temporary interruption of a controversy to "consider incidentally a question which has happened to cross the path of such litigation . . ." *Segurola* v. *United States*, 275 U.S. 106, 112. Yet, if the United States is permitted to obtain review of the discovery order below, it will achieve precisely this result. Moreover, it will saddle this Court with an obligation to review similar interlocutory orders whenever a plain-

tiff chooses to bring them before the Court by means of a dismissal order. Accepting jurisdiction in this appeal will constitute a precedent for fragmentary appellate review that will hereafter plague this Court and the courts of appeals.

None of the three cases relied on by plaintiff supports jurisdiction here. In *United States* v. *Yellow Cab Company,* 332 U.S. 218, the appeal was from a district court order granting a motion by defendants to dismiss the complaint for failure to state a claim upon which relief might be granted—unmistakably a final termination of the controversy. Likewise, in *United States* v. *Wallace & Tiernan Co.,* 336 U.S. 793, there was, in practical effect, a determination on the merits. The underlying orders of the court barred the plaintiff from using evidence essential to its case. The dismissal that followed, although without prejudice, was a final judgment because the privilege of the United States to bring another complaint was, lacking the necessary supporting evidence, a hollow one. Finally, in *United States* v. *Cotton Valley Operators Committee,* 339 U.S. 940, the trial court dismissed the complaint as a penalty imposed upon plaintiff for its failure to obey a discovery order. Under Rule 41(b) this dismissal, which was not requested or obtained by the plaintiff, was a determination with prejudice and forever barred the United States from again bringing its cause of action. Since the controversy could not be continued, the dismissal had the requisite finality.[4]

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[4] This Court noted probable jurisdiction, 338 U.S. 937, and affirmed by an equally divided court, 339 U.S. 940.

2. Even if the Dismissal Order Possessed the Requisite Finality, It Is Not Appealable Because It Was Invited, Procured and Obtained by the Appellant

Appellant is before this Court in an attempt to appeal from an order which it and it alone invited and requested the district court to enter. This fact alone requires dismissal of the appeal.

The record is clear that the dismissal was invited and expressly moved by the plaintiff. The original discovery orders of July 23, 1956 provided no penalty for disobedience. They merely required the plaintiff to produce the appropriate grand jury transcripts within thirty days. The orders of dismissal were not imposed thereafter by the district court as a penalty for non-compliance. The court never reached the question of penalizing non-compliance or of providing a remedy for it. If it had it might have taken many other types of action, other than dismissal, provided for in Rule 37. Nor were the dismissal orders sought or even suggested by the defendant-appellees. The orders of dismissal were entered pursuant to an amended order obtained by plaintiff for the express and sole purpose of obtaining immediate appellate review of the discovery order.

Counsel for defendants merely indicated that in the circumstances the amended order providing for dismissal "does not seem to be a relief which they could in any manner oppose." (J.A. 32, 37, 39).

Where dismissal is at the plaintiff's request, it is well settled that the plaintiff cannot later appeal. Among the leading authorities for this rule is *Francisco* v. *Chicago & A.R. Co.*, 149 Fed. 354 (8th Cir. 1906, Sanborn, J.). The Court of Appeals refused to

review a judgment of dismissal which plaintiff had invited. It held that one who requests a judgment cannot later object to it. The court said:

> "It is said that this was an involuntary nonsuit because the plaintiff was forced to take it by the decision of the trial court that he had proved no cause of action, . . . The answer is (1) . . . an indispensable condition of its review at the instance of a plaintiff in error in a national court is that it was granted 'without his consent and against his objection,' and this judgment lacks this condition, for the nonsuit was granted at his request and by his active procurement; (2) that the plaintiff was not forced by the decision of the court below that he had failed to prove his case to take a nonsuit, but he had the option to take the verdict and judgment against him and to review it, and if it was erroneous to reverse it by writ of error, or to take the dismissal of the action and try again. . . ." (149 Fed. at 358).

This Court has said on numerous occasions that a plaintiff who has voluntarily become nonsuit, cannot sue out a writ of error. *Evans* v. *Phillips,* 4 Wheat. 73; *Central Transp. Co.* v. *Pullman's Palace Car Co.,* 139 U.S. 24, 39. Lower courts have reiterated the rule. *Marks* v. *Leo Feist,* 8 F. 2d 460 (2d Cir. 1925). As the court put it in *Cybur Lumber Co.* v. *Erkhart,* 247 Fed. 284, 285 (5th Cir. 1918), "A plaintiff cannot except to his own motion for a voluntary nonsuit, because, if it was error to grant it, he invited the error." See also *Kelly* v. *Great Atlantic & Pacific Tea Co.,* 86 F. 2d 296 (4th Cir. 1936). Compare *United States* v. *Wallace & Tiernan Co.,* 336 U.S. 793, where this Court held a dismissal order appealable, saying:

> ". . . The record fails to sustain appellees' contention that the Government invited the court to enter

this order denying relief and dismissing the action." (336 U.S. at 794).

The same principle is applicable to judgments entered on consent. *Pacific Railroad Company of Missouri* v. *Ketchum,* 101 U.S. 289; *United States* v. *Babbitt,* 104 U.S. 767; *Swift & Co.* v. *United States,* 276 U.S. 311; *Ballott* v. *United States,* 171 Fed. 404 (1st Cir. 1909). Where a party, for whatever purpose, agrees to the entry of an order, the courts will not permit that party to complain about the order later on. Even if the only purpose of the consent is to permit appellate review, consent destroys the right to such review. *United States* v. *Babbitt,* 104 U.S. 767.

Whatever the circumstances, a party simply cannot be aggrieved by an order entered with his consent. Nor does the fact that the dismissal is with prejudice affect this result. In *International Carrier-Call & Television Corporation* v. *Radio Corporation of America,* 142 F. 2d 493 (2d Cir. 1944), the plaintiff consented to a dismissal with prejudice, and later sought to appeal. Although the judgment was admittedly a bar to any further action, the Court of Appeals refused to consider the appeal, saying:

> "Having consented to a final dismissal of the unfair competition count, it is utterly fatuous to suppose that this part of the judgment can be reversed on appeal." (142 F. 2d at 494).

3. No Necessity Exists for Review of the Interlocutory Order at This Time

The appellant's Jurisdictional Statement attempts to persuade this Court that the interlocutory direction entered by the court below requires review at this time. The precise contrary is true. The court's direction that

the defendants be given access to the grand jury transcripts should be reviewed only in the context of the total problems of this anti-trust case, and particularly, the problems of administration of a "Big Case" that are so burdensome and vexatious. It should not, and cannot properly, be appraised in midstream, as an abstract question.

It is by now clear that the "secrecy" of grand jury proceedings does not extend a blanket cloak of immunity for all time and in all circumstances to the testimony of witnesses. *Cf., United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 233-234; *Herzog* v. *United States,* 75 S. Ct. 349; Wigmore, *Evidence* (3d Ed.) §§ 2360, 2361. Certainly, the Attorney General is not the final judge of when and in what circumstances grand jury proceedings are to be disclosed. (*Cf.* the appellant's argument that grand jury documents are subject to the Attorney General's "privilege", Jur. St. 8-9).

The present case involves the question of whether and in what circumstances a trial court, charged with the burdensome responsibility of administering a vast antitrust case, may direct that testimony before a grand jury should be made available to defendants. This is a substantial question, but it should be decided in the light of a specific and completed situation. It certainly should not be decided by this Court in the present circumstances where (1) no order was entered implementing or refining the direction to produce; (2) the plaintiff has neither obeyed nor disobeyed; (3) discovery was in midstream and by no means completed when the order was entered; (4) the merits of the controversy are undetermined, and actually undefined. In

short, this Court should consider this problem, which has vast implications in antitrust administration, in light of an actual, completed controversy where the considerations which motivated the trial judge and the entire setting and consequences of the order may be specifically evaluated.

Certainly, in the context of the present case, it cannot be contended that the trial judge lacked jurisdiction to enter the order complained of, or that the order was an abuse of discretion. As the chronology of this case reveals, the grand jury investigation which preceded the filing of the civil complaint in this case, and which resulted in no indictments, was a device employed by the United States to gather information and for purposes of discovery. The civil action was started against these appellees just as soon as the grand jury, its investigatory work complete, was discharged. The grand jury investigation terminated on November 25, 1952; the civil complaint was filed exactly 15 days later.

The district court found that the Government was actually using in the civil actions the information obtained through the medium of the grand jury investigation. (Opinion, Jur. St. 23). The court also found that equal access to such information was needed for appellees' preparation of their defense. (Opinion, Jur. St. 23). In addition, the Court found that none of the usual reasons for maintenance of grand jury secrecy applied to the particular facts of the present case, where the grand jury had long since been discharged and the testimony in the transcripts was being used by one side in a civil case.

Finally, the district court found that the ends of justice required it to exercise its discretion under Rule 34 to compel equal disclosure of information to both sides. (Opinion, Jur. St. 23).

The order of the district court must be viewed in the light of the administrative necessities involved in a mammoth antitrust case such as this. The defendants might have taken the depositions of all persons having knowledge of the case, including all witnesses who testified before the grand jury. These witnesses might have been asked to state their recollection as to their testimony before the grand jury. Their recollection after several years would have been faulty. One of the important witnesses is deceased. But more important, this deposition procedure would have been vastly cumbersome, expensive and time-consuming. It would have achieved a result less satisfactory in the long run than disclosure of the grand jury testimony, and it would in the meantime have greatly increased the burdens of all parties and witnesses as well as the court.

The order of the district court does not purport to establish a far-reaching rule. It is merely a holding that in this "Big Case", where the Government is using information from grand jury transcripts, the fairest and most practical way to make this information available to both sides in accordance with the command of the Federal Rules of Civil Procedure is to require disclosure of the transcripts themselves rather than have this information elicited by a circuitous and unsatisfactory substitute method.

In support of its objections to the lower court's order, the United States took the position that it had some sort of privilege with respect to the grand jury

minutes. It seems appropriate to point out that under Rule 6 of the Federal Rules of Criminal Procedure it is the court and not the United States which supervises grand juries and the secrecy or disclosure of grand jury minutes. Authorized officials of the Department of Justice may have access to such information, but the Attorney General does not have a proprietary right in the grand jury minutes or any supervisory power with respect to the availability of these minutes. The district court, as the Rule makes plain, has sole responsibility for the secrecy of the minutes, and it is to the court alone that application can be made for disclosure of grand jury transcripts. Hence, the Government's claim of privilege is groundless and gains no support from cases where disclosure of documents belonging to the Government, such as reports vital to national security, has been sought.

Appellees have contended that, given even the most extraordinary circumstances, the procedure followed by the United States in attempting to obtain review of the discovery order entered below is not permissible. Certainly there is nothing in this case that should induce this Court to strain the well-established principles governing appellate review in order to consider the merits of this order at the present time.

CONCLUSION

For the foregoing reasons, appellee, Lever Brothers Company, respectfully submits that the appeal should

be dismissed or that the judgment below should be affirmed.

Respectfully submitted,

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